**Falcon Wheel Division L.L.C. *and* General Truck Drivers, Chauffeurs & Helpers of San Pedro, Wilmington, Long Beach & Vicinity, Local 692, International Brotherhood of Teamsters, AFL–CIO.** Case 21–CA–34646

November 20, 2002

DECISION AND ORDER

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

The General Counsel seeks summary judgment in this case because the Respondent has failed to file an answer to the complaint. Upon a charge filed by the Union on July 5, 2001, the General Counsel issued the complaint on October 31, 2001, against Falcon Wheel Division L.L.C., the Respondent, alleging that it has violated Section 8(a)(5) and (1) of the Act. The Respondent failed to file an answer.

On December 12, 2001, the General Counsel filed a Motion for Summary Judgment with the Board. On December 18, 2001, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

Ruling on Motion for Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively states that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Region, by letter dated November 19, 2001, notified the Respondent that unless an answer was received by November 26, 2001, a Motion for Summary Judgment would be filed.

Our dissenting colleague argues that the complaint fails to allege a prima facie case because the General Counsel did not allege that the layoff constituted a material, substantial, and significant change in the terms and conditions of employment of the unit employees. We disagree.

It is well established that "a layoff of employees effects a material, substantial, and significant change in the affected employees' working conditions." *Odebrecht Contractors of California, Inc.*, 324 NLRB 396, 402 (1997), citing *NLRB v. Katz*, 369 U.S. 736, 747 (1962); *Ladies Garment Workers Local 512 v. NLRB*, 795 F.2d 705, 710–711 (9th Cir. 1986); *Rangaire Co*., 309 NLRB 1043, 1047 (1992). Accord: *NLRB v. Advertisers Mfg. Co*., 823 F.2d 1086, 1090 (7th Cir. 1987) ("Laying off workers works a dramatic change in their working conditions (to say the least). . . ."). Thus, it is not necessary for the General Counsel to separately allege that a layoff is a material, substantial, and significant change in order to establish a prima facie case. Rather, the significance of the change is inherent in the laying off of the employees.

The language cited by the dissent from *Taino Paper Co.*, 290 NLRB 975, 978 (1988), is not inconsistent with our position. In *Taino*, the judge merely stated that the General Counsel had established a prima facie case by demonstrating that the union was the bargaining representative, the layoff was a mandatory subject of bargaining, the company did not give notice to or bargain with the union about the layoff, and that the layoff was a material, substantial, and significant change in the employees' terms and conditions of employment. The judge did not in any way indicate that the General Counsel was required to allege and prove the significance of the change as a separate element in order to establish a prima facie case.

In addition, the other cases cited by our dissenting colleague involved changes other than layoffs, and therefore do not establish that the General Counsel must separately allege that a layoff is a significant change in order to establish a prima facie case. See *United Technologies Corp.*, 278 NLRB 306 (1986) (change not significant because it was merely an incentive to review bills to detect over billing); *Golden Stevedoring Co*., 335 NLRB 410 (2001) (formalization of disciplinary procedure constituted a significant change); *Millard Processing Services*, 310 NLRB 421, 425 (1993) (changes to shifts, insurance carriers, increase in health insurance premiums, decrease in wage rates, reduction in bus transportation, and imposition of fee for lost checks constituted significant changes); *Peerless Food Products*, 236 NLRB 161 (1978) (limitation on access by union to employees while working not a significant change).

The dissent also states that the General Counsel has not alleged any change in the employees' terms and conditions of employment, let alone a material change. Certainly, as discussed above, being laid off from a job has been held to be a change in the terms and conditions of an employee's employment, since the employee would go from having a job to not having a job. However, assuming that our colleague means that the General Counsel has not alleged that there was a change in the employer's past practice of laying off employees, we note that an employer has a duty to bargain with a newly certified union over layoffs, even where the employer contends that the layoffs at issue are consistent with an es-

tablished past practice. See *Adair Standish Corp*., 292 NLRB 890 fn. 1 (1989), enfd. in relevant part 912 F.2d 854, 863 (6th Cir. 1990) (employer's "unilateral maintenance of its lay-off policy following the election directly contravened section 8(a)(5)."); Accord: *NLRB v. Advertising Mfg. Co.*, supra, 823 F.2d at 1090 (unilateral layoff of employees violated the Act, and "[i]t is not a good answer that the company did nothing different from . . . what it did before there was a union"). Thus, if an employer violates the Act by failing to bargain with the union about layoffs where it is merely maintaining its previously established layoff policy, then it follows that alleging that the layoffs constituted a change in the employer's past practice cannot be considered a separate and necessary element of the prima facie case.

Here, the complaint alleges that the Union was certified on September 27, 2001, as the bargaining representative for a unit of the Respondent's employees; that on February 23, 2002, the Respondent laid off employee Jose Martell; that this is a mandatory subject for collective bargaining; and that the Respondent took this action without prior notice to the Union and without affording the Union an opportunity to bargain with it concerning this conduct. These allegations in the complaint are sufficient to establish a cause of action. Further, by choosing not to file an answer to the complaint, the Respondent has admitted each of these allegations, and has further admitted that it has failed and refused to bargain collectively with the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(1) and (5) of the Act.

Accordingly, in the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

## FINDINGS OF FACT

### I. JURISDICTION

At all material times, the Respondent, a corporation with an office and place of business in Gardena, California, has been engaged in the production and nonretail sale of wheels and other molded parts. During the 12-month period ending August 18, 2000, a representative period, the Respondent, in conducting its business operations, sold and shipped from its Gardena, California facility goods valued in excess of $50,000 directly to points outside the State of California. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

### II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time production and maintenance employees employed by the Employer at its facility located at 407 E. Redondo Beach Boulevard, Gardena, California; excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

On September 27, 2000, the Union was certified as the exclusive collective-bargaining representative of the unit. At all times since September 27, 2000, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

About February 23, 2001, the Respondent laid off employee Jose Martell. This conduct relates to wages, hours, or other terms and conditions of employment of the unit employees and is a mandatory subject for the purposes of collective bargaining.

The Respondent engaged in the above conduct without affording the Union an opportunity to bargain with the Respondent with respect to this conduct.

## CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has been failing and refusing to bargain collectively with the exclusive collective-bargaining representative of its employees, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) of the Act by laying off employee Jose Martell about February 23, 2001, without notice to or bargaining with the Union, we shall order the Respondent to offer Jose Martell full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful conduct. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Falcon Wheel Division L.L.C., Gardena, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with General Truck Drivers, Chauffeurs & Helpers of San Pedro, Wilmington, Long Beach & Vicinity, Local 692, International Brotherhood of Teamsters, AFL–CIO as the exclusive representative of the employees in the unit set forth below, by unilaterally changing terms and conditions of employment, including the layoff of employees, without notifying the Union and affording it an opportunity to bargain about these changes:

> All full-time and regular part-time production and maintenance employees employed by the Employer at its facility located at 407 E. Redondo Beach Boulevard, Gardena, California; excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith with the Union concerning terms and conditions of employment, including the layoff of employees.

(b) Within 14 days from the date of this Order, offer full reinstatement to Jose Martell to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed.

(c) Make Jose Martell whole for any loss of earnings and benefits he may have suffered as a result of his layoff, plus interest, as set forth in the remedy section of this decision.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Gardena, California, copies of the attached notice marked "Appendix."[1] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 23, 2001.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER COWEN, dissenting.

Contrary to my colleagues, I would deny the General Counsel's Motion for Summary Judgment because the complaint on which it is based fails to allege a violation under Section 8(a)(5) and (1) of the Act. The complaint alleges that after the Union was certified as the exclusive bargaining representative of a unit of the Respondent's employees, the Respondent, on February 23, 2001, laid off employee Jose Martell without affording the Union an opportunity to bargain with the Respondent with respect to the layoff. The complaint also alleges that the layoff is a mandatory subject of bargaining. However, the complaint fails to allege that the layoff constituted a unilateral change.[1] To establish a prima facie case in the situation before us, the General Counsel must show that

> (1) the Union was the bargaining representative of the laid-off employees at the time of their layoff, (2) the layoff was a mandatory subject of bargaining, (3) the Company did not give notice to, nor did it bargain with, the Union about the decision to have a layoff or its im-

[1] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] Cf. *Kal-Die Casting Corp.*, 221 NLRB 1068 (1975) (routine production scheduling and adjustments relating to diminishing available hours of work without bargaining with the union does not violate Sec. 8(a)(5) in the absence of evidence that this activity varied from the employer's past practice); *KDEN Broadcasting Co.*, 225 NLRB 25, 35 (1976) (failure to bargain over scheduling changes not violative of Sec. 8(a)(5) in absence of evidence that changes inconsistent with employer's past practice of making scheduling changes).

> pact on unit employees, and (4) the layoff constituted a material, substantial, and significant change in the terms and conditions of employment of unit employees.

*Taino Paper Co.*, 290 NLRB 975, 978 (1988). The Board has consistently reaffirmed that it is not enough that an alleged unilateral change involves a mandatory subject of bargaining; it also must be a material, substantial, and significant change in the terms and conditions of employment to trigger the employer's statutory bargaining obligation. Id. at 977-978 (citing *United Technologies Corp.*, 278 NLRB 306 (1986)); *Golden Stevedoring Co.*, 335 NLRB 410, 415 (2001) (quoting *Millard Processing Services*, 310 NLRB 421, 425 (1993)); and *Peerless Food Products*, 236 NLRB 161 (1978). Although the complaint in this case alleges the first three elements of a prima facie case, the General Counsel has not alleged any change in the terms and conditions of employment, let alone a material change. Thus, an element of the prima facie case is missing from the complaint allegation, and the Board cannot find a violation of Section 8(a)(5). Accordingly, the General Counsel's Motion for Summary Judgment should be denied.

In reaching a different conclusion, my colleagues argue that layoffs are somehow different from all other alleged unilateral changes in working conditions, which they acknowledge require proof of "change" to establish an unfair labor practice. This argument does not withstand scrutiny.

My colleagues assert that layoffs are so obviously a "change" in working conditions that it is not necessary to require the General Counsel to allege the obvious. While I agree that a layoff frequently involves a "change" in working conditions, this is not universally so, and absent a universal truth, the General Counsel should not be excused from the simple pleading requirement of alleging a "change."

For example, many industries experience seasonal fluctuations in the size of the work force. And in these industries, many companies have well-established systematic layoff and recall procedures. In such circumstances, the layoff and recall procedures may very well be working conditions that may not be changed unilaterally. *Cf. California Date Growers Assn.*, 118 NLRB 246, 260–261 (1957), enfd. 259 F.2d 587 (9th Cir. 1958) (seniority system established prior to union relationship unlawfully changed for striking employees where seniority was basis for conducting seasonal layoffs).

Moreover, even in nonseasonal industries, layoff and recall practices may represent established working conditions upon which the employees rely. Particular employees may have requested periodic layoff to attend to other affairs, layoffs may be rotated on a regular cycle, or there may be an established seniority system. In any event, the layoff and recall practices may be sufficiently stable and predictable to constitute an established working condition. *See NLRB v. Frontier Homes Corp.*, 371 F.2d 974, 980 (8th Cir. 1967) (established seniority-based layoff practice may not be changed without consultation with union; considerations of ability allowed by expired contract not controlling).

It is true that we do not know whether any of these circumstances—or others not enumerated here—are present in this case. But that is exactly my point. Without an allegation that the layoff at issue constitutes a change in working conditions, we simply do not know whether a "change" has occurred. And without a "change" it cannot be said that the Employer has violated Section 8(a)(5) of the Act by unilaterally changing working conditions.

As a final matter, to the extent that my colleagues point to some cases as implying that no "change" is necessary to find an unlawful unilateral change regarding a layoff, the cited cases do not support that conclusion and my colleagues offer no rationale for this curious proposition. It is true that the Board has considered and rejected various factual arguments that a particular case involves a preexisting layoff and recall procedure that is sufficiently stable and predictable to constitute an established working condition. But these cases do not abandon "change" as the touchstone of the violation; rather, they embrace it. *Adair Standish Corp. v. NLRB*, 912 F.2d 854, 864 (6th Cir. 1990) ("This argument [that the layoff policy could be continued as the status quo] unjustifiably presumes that the company's lay-off practice prior to the election was systematic, as opposed to sporadic"); *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1090 (7th Cir. 1987) ("The rule that requires an employer to negotiate with the union before changing the working conditions in the bargaining unit is intended to prevent the employer from undermining the union . . .").

In sum, a layoff does not always constitute a change in existing working conditions. This being so, where the General Counsel alleges a violation of Section 8(a)(5) of the Act based upon an alleged layoff, he is not excused from alleging and proving that the layoff is a "change" in the employees' working conditions. Since my colleagues do not hold the General Counsel to this simple pleading requirement, I dissent.

## APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain with General Truck Drivers, Chauffeurs & Helpers of San Pedro, Wilmington, Long Beach & Vicinity, Local 692, International Brotherhood of Teamsters, AFL–CIO as the exclusive representative of the employees in the unit set forth below, by unilaterally changing terms and conditions of employment, including the layoff of employees, without notifying the Union and affording it an opportunity to bargain about these changes:

All full-time and regular part-time production and maintenance employees employed by us at our facility located at 407 E. Redondo Beach Boulevard, Gardena, California; excluding all other employees, office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain in good faith with the Union concerning terms and conditions of employment, including the layoff of employees.

WE WILL, within 14 days from the date of the Board's Order, offer full reinstatement to Jose Martell to his former position, or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges previously enjoyed.

WE WILL make Jose Martell whole for any loss of wages and benefits he may have suffered as a result of his layoff, plus interest.

FALCON WHEEL DIVISION L.L.C.